SUPREME COURT, U.S.

08-859 FILED 2008

114 (1)

No.

IN THE

Supreme Court of the United States

CONSOLIDATION COAL CO.,

Petitioner,

v.

LEVISA COAL CO.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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December 16, 2008

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QUESTION PRESENTED

This case arises from the denial of a motion for a preliminary injunction brought by respondent Levisa Coal Company. At the close of Levisa's presentation of evidence on its motion, the trial court granted petitioner Consolidation Coal Company's request to deny the motion because Levisa had failed to prove it would suffer irreparable harm. The trial court also dismissed Levisa's complaint. For that reason, Consolidation had no need to present evidence or assert its affirmative defenses. On appeal, the Virginia Supreme Court held that the trial court erred in denying Levisa's motion for a preliminary injunction and dismissing its complaint. Instead of simply vacating the trial court's order and remanding for further proceedings on the merits, however, the court decided a critical substantive issue on the merits of the case in favor of Levisa. The court did so based solely on the one-sided record created in the curtailed preliminary injunction hearing, which contained only evidence introduced by Levisa. The record did not include key documents that petitioner Consolidation would have put forward if the trial court had proceeded with a complete hearing. The question presented is:

Whether the Virginia Supreme Court violated petitioner Consolidation's rights under this Court's settled reading of the Due Process Clause of the Fourteenth Amendment by entering a judgment on the merits against Consolidation when Consolidation had never been given an opportunity to present evidence in its defense or to raise its affirmative defenses?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Consolidation Coal Company states as follows:

Consolidation Coal Company is a wholly-owned subsidiary of CONSOL Energy, Inc., a publicly-traded company. No publicly-held company owns 10% or more of the stock of CONSOL Energy, Inc.

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INTRODUCTION

This case involves a simple, yet fundamental, issue—the right of a party to present evidence in its own defense before being deprived of a property right. As this Court has held for over one hundred years, a state court decision that precludes such an opportunity to be heard violates the Due Process Clause of the Fourteenth Amendment. *See Saunders v. Shaw*, 244 U.S. 317 (1917); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *see also Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930).

The Virginia Supreme Court violated that longstanding precedent in this case. The court ruled that petitioner Consolidation Coal Company had no right to store water from its mining operations in a mine leased by its subsidiary from respondent Levisa Coal Company. But it made that ruling based on the record of a truncated preliminary injunction hearing during which only Levisa had presented evidence. After the close of Levisa's evidence in support of its motion, Consolidation moved to deny relief because Levisa had failed to prove irreparable harm. The trial court granted this motion and denied the injunction. The court then also entered judgment for Consolidation and dismissed Levisa's complaint on the merits. Consolidation thus had no opportunity, or need, to put on its defense, which would have included two critical documents that are necessary to understand the lease agreement and affirmative defenses.

The Virginia Supreme Court reversed. But instead of merely vacating the trial court's order and remanding for further proceedings, the Virginia Supreme Court went further and decided a central

issue in the case on the merits—how to interpret the lease agreement—based solely on the evidence presented by Levisa. For the remand, the Virginia Supreme Court suggested that the only remaining issue would be remedy (whether a permanent injunction was warranted). In reaching that result, the Virginia Supreme Court deprived Consolidation of its opportunity both to present evidence in support of its interpretation of the lease agreement and to present its affirmative defenses to Levisa's claims.

That ruling violated the longstanding precedent of this Court. *See Saunders*, 244 U.S. at 319; *Windsor*, 93 U.S. at 277. Indeed, this case is virtually an exact replica of *Saunders*. In *Saunders*, a state trial court had entered judgment for the defendant at the close of an injunction hearing based on the plaintiff's failure to prove its case. The state appellate court reversed and ruled against the defendant on the merits of the case, despite the fact that the defendant had had no opportunity to present evidence in its own defense. *Id.* at 319. This Court reversed, holding that the state court's failure to afford the defendant an opportunity to be heard violated the Due Process Clause. *Id.* at 320.

Here, by deciding a critical issue in the case on the merits, rather than remanding to the trial court so that Consolidation could present its defense, the Virginia Supreme Court violated Consolidation's due process rights in direct contravention of *Saunders*. For this reason, Consolidation respectfully requests that this Court grant the writ and reverse.

OPINIONS BELOW

The Supreme Court of Virginia's opinion, *Levisa Coal Co. v. Consolidation Coal Co.*, 662 S.E.2d 44 (Va. 2008), is reprinted at App. 2a–29a. The order of the trial court is reprinted at App. 30a–31a. The transcript of the trial court's oral ruling is reprinted at App. 32a–38a.

JURISDICTION

The Supreme Court of Virginia rendered its decision on June 6, 2008. App. 2a. Consolidation filed a timely petition for rehearing that was denied on September 18, 2008. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISION

The Due Process Clause of the Fourteenth Amendment provides in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Background

This case arises out of a dispute between respondent Levisa Coal Company and petitioner Consolidation Coal Company over the storage of mine water, which is water that naturally occurs as a result of mining operations. Consolidation has been storing mine water produced from its mining operations in Buchanan County, Virginia in an inactive mine void known as the "VP3 mine." App.

5a–6a. The underlying question before the state court was whether Consolidation had the right to store the water in the VP3 mine under a 1956 lease agreement between Levisa and Consolidation's subsidiary (the "1956 Lease"). The 1956 Lease conveyed rights to the VP3 mine and the surrounding mining areas (known as the "Buchanan parcels"). Interpreting the 1956 Lease requires looking not only at the lease agreement itself, but also at other deeds and leases in the chain of title that are expressly referenced in the 1956 Lease.

The first document necessary to understand Consolidation's rights is a deed executed in 1908 (the "1908 Deed"). The 1908 Deed conveyed to the predecessor-in-interest of the Prater Coal Land Company the rights to "all coal, oil, and gas and other minerals" in the Buchanan parcels. In addition, the 1908 Deed conveyed the right of

> ingress, egress and passage over, through and under the surface of the said several tracts of land, for the purposes of mining and removing all the coal, oil and gas from said tract, as from *the other lands mined* by the said party of the second part [Prater], *or assigns*.

App. 50a (emphasis added).[1] Importantly, the 1908 Deed also granted rights

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[1] As explained below, neither the 1908 Deed nor the Pobst/Combs Deed is part of the record below—that is part and parcel of the very due process violation Consolidation is asserting here. *See infra* pp. 12–16. Relevant portions of all pertinent agreements are reproduced in the Appendix.

> over and under the surface of said tract of land, as may be necessary for removing the said coal or other minerals, *from this and any other lands mined or leased by the said party of the second part or assigns*, and for other purposes incident to the operations herein contemplated.

App. 51a–52a (emphasis added). The 1908 Deed thus granted the right not only to mine the Buchanan parcels, but also the right to use the land as necessary to mine "any other lands mined or leased." *Id.*

In 1937, H. Claude Pobst and F.H. Combs obtained the rights to the Buchanan parcels for use by their company—the Levisa Coal Corporation (now Levisa Coal Company). First, Pobst and Combs obtained by deed all of the rights to the land that Prater Coal had obtained in the 1908 Deed. This deed (the "Pobst/Combs Deed") provided:

> It is the intention of the deed to convey and the said party of the first part does hereby convey unto the said parties of the second part all of the real estate, *together with all rights and easements appurtenant o[r] incident thereto, owned by said party of the first part* in Buchanan County, Virginia, whether hereinbefore mentioned and described or not.

App. 48a (emphasis added). The Pobst/Combs Deed thus transferred "all rights and easements" obtained by Prater Coal in the 1908 Deed, including the absolute right to use the land as necessary to mine the Buchanan parcels "and any other lands mined or leased."

Pobst and Combs immediately deeded the rights they had obtained over the Buchanan parcels to Levisa (the "1937 Deed"). App. 3a; *see also* App. 44a–46a. The 1937 Deed grants and conveys to Levisa Coal Corporation "all the coal, metals and timber, *together with all rights, privileges and easements incident thereto which were acquired*" by Pobst and Combs from Prater Coal. App. 45a–46a (emphasis added); *see also* App. 3a. The 1937 Deed plainly evidences the intent to transfer to Levisa *all* of the rights Pobst and Combs obtained in their deed, including the right to use the land as necessary to facilitate the mining of other lands.

In 1956, Levisa entered into the 1956 Lease with Island Creek Coal Company. App. 39a–43a. In addition to granting Island Creek the right to mine and remove coal from the leased areas, *see* App. 4a–5a, the 1956 Lease gave Island Creek the right "generally, to make any use of the leased premises which [Island Creek] may deem needful or convenient in carrying on its mining or other operations." App. 41a; *see also* App. 4a. This specifically *included* the right to "dump water or refuse on said premises." App. 41a.

Of course, the 1956 Lease conveyed to Island Creek only the rights that Levisa "owns and has the right to lease." App. 42a. But reading the 1956 Lease in conjunction with the other relevant documents in the chain of title, including the 1937 Deed, the Pobst/Combs Deed and the 1908 Deed, it is clear that Levisa (and its lessee Island Creek) had the right not only to remove coal from the leased premises, but also to use those areas to facilitate its removal of coal "from . . . any other lands mined or

leased by the said party or assigns" and "for other purposes incident to the operations herein contemplated." App. 51a–52a.

In 1993, CONSOL Inc. (now CONSOL Energy, Inc.) acquired Island Creek and all of its assets, including its rights under the 1956 Lease. App. 6a. Island Creek is now a subsidiary of petitioner Consolidation (which itself is a subsidiary of CONSOL Energy). Consolidation has active mining operations near the VP3 mine. App. 6a. As is common in mining, Consolidation's mining operations create a large amount of mine water that must be pumped out of the mine. App. 7a. Initially, Consolidation deposited the excess mine water into the nearby Levisa River. App. 7a. When this solution became untenable, Consolidation designed an alternative system whereby the excess mine water would be pumped into a series of abandoned mine voids once operated by Island Creek, including the VP3 mine, pursuant to a written agreement with Island Creek. App. 7a–8a. It was undisputed below that the VP3 mine has been idled and that mining in the VP3 mine "is not presently economically feasible." App. 6a. Consolidation actually began pumping mine water into the VP3 mine in 2006. App. 8a.

B. Procedural History

Notwithstanding Consolidation's right to use the VP3 mine to facilitate its removal of coal "from . . . any other lands mined or leased by the said party or assigns" (including its other Buchanan mines), and notwithstanding that mining the VP3 mine is not "economically feasible," Levisa filed suit against Consolidation. The suit alleged that depositing mine

water in the VP3 mine was a trespass that would cause irreparable harm to Levisa. App. 9a; *see also* Virginia Supreme Court Record ("Va.Rec.") 1–27. Levisa sought a declaratory judgment that Consolidation "lacks the legal right to pump and store its Buchanan Mine water in the [VP3 mine]," Va.Rec. 6; App. 9a, and sought a preliminary injunction to stop Consolidation from depositing the mine water in the VP3 mine, App. 9a.

Consolidation filed a demurrer to the complaint in which it asserted its legal right to store mine water in the VP3 mine. *See* Va.Rec. 69–75; App. 9a–10a. Consolidation also argued that Levisa had no right to preliminary injunctive relief because, even if Levisa were being harmed by Consolidation's actions (which Consolidation disputed), any such harm was compensable by money damages and thus was not irreparable. App. 10a. Importantly, Consolidation also filed an answer asserting a number of affirmative defenses, including laches and ratification. App. 9a–10a; *see also* Va.Rec. 30–31.

After only preliminary discovery, the state trial court held a two-day hearing on the motion for a preliminary injunction. App. 10a. At the hearing, Levisa put forward a number of witnesses who testified concerning the relationship between Levisa, Island Creek and Consolidation, and the harm Levisa would suffer if the dumping of the mine water continued. App. 10a–13a. Levisa also introduced a number of exhibits, including the 1956 Lease and the 1937 Deed. Importantly, however, Levisa did *not* introduce the Pobst/Combs Deed or the 1908 Deed, presumably because these documents were not helpful to its case.

At the close of Levisa's evidentiary presentation, Consolidation moved to strike the evidence. App. 14a; *see also* Va.Rec. 623–626. Consolidation rested its motion solely on the argument that Levisa failed to establish that it would suffer any irreparable harm absent a preliminary injunction. *See* Va.Rec. 624 ("Their case fails, and I will just deal with one narrow point of it, with respect to irreparable harm."); *see also id.* (describing irreparable harm as "the threshold issue"). Consolidation argued both that Levisa had failed to show harm because any alleged damages were too speculative, *id.* at 625, and that any harm it did suffer would not be irreparable because "[t]here is clearly an adequate remedy at law," *id.*

Consolidation made no other arguments at the hearing. Indeed, Consolidation specifically declined to address the legal question whether Consolidation had the right to store water in the mine, reserving that for "[w]hen we have a chance to prove our case," *id.* at 658. Consolidation concluded: "[F]or right now, there has been no showing of irreparable harm. That is the threshold, the first requirement. For that reason . . ., the motion should be denied." *Id.* at 658–59.

The trial court agreed and granted Consolidation's motion to strike the evidence. App. 30a–31a. The court based this ruling on its finding that Levisa had failed to show irreparable harm. App. 32a–38a. The court questioned whether Levisa would suffer any damages, given that "it may never be economically feasible" to mine the VP3 mine, App. 34a, but held that, in any event, Levisa "has an adequate remedy at law" for any potential damages,

App. 36a. The court also noted that the harm to Consolidation from an injunction would be "astronomical." App. 36a. The court concluded: "But primarily I think the plaintiff has been clearly unable to establish the irreparable harm element" that would allow injunctive relief. App. 37a.

Only after issuing this holding did the court offer "[a] comment or two about the lease agreement." App. 37a. The court stated that it "would adjudicate [the] issue" whether Consolidation "has the right to place any kind of storage water in the VP3 mine" in favor of Consolidation. App. 38a. The court subsequently entered a final order memorializing this oral ruling and dismissing the case on the merits. App. 30a–31a.

Levisa sought review in the Virginia Supreme Court, which reversed. App. 2a–29a. The Virginia Supreme Court did not, however, base its ruling on any error in the trial court's holding concerning irreparable harm. Instead, the court reached out and decided, on an incomplete record, a central question on the merits of the case—namely, whether Consolidation had the "right to use any portion of the mineral estate to support mining operations on other lands." App. 22a. In addressing that issue, the court considered *only* the 1956 Lease and the 1937 Deed. *See, e.g.*, App. 22a. It did *not* consider the Pobst/Combs Deed or the 1908 Deed, because those deeds were not introduced into evidence in the truncated hearing on the preliminary injunction.

Nevertheless, the court ruled that it was definitively deciding the question of Consolidation's rights under the 1956 Lease.

> [B]ecause of the absence of any right of Consolidation Coal to store excess water from its mine in the VP3 Mine . . . the issue before the circuit court [on remand] will no longer involve the consideration of temporary injunctive relief but, rather, whether the circumstances warrant the issuance of a permanent injunction.

App. 25a.

In a timely petition for rehearing, Consolidation argued that the Virginia Supreme Court's ruling violated Consolidation's rights under the Due Process Clause of the Fourteenth Amendment because the court had decided a key issue in the case—the interpretation of the 1956 Lease—even though Consolidation had *never* been afforded an opportunity to present its evidence (which would have included the 1908 Deed and the Pobst/Combs Deed) or assert its affirmative defenses. The Virginia Supreme Court denied rehearing. App. 1a.

This petition follows.

REASON FOR GRANTING THE WRIT

The Ruling Below Violates This Court's Precedent Under the Due Process Clause Because It Determined a Central Issue on the Merits Against Consolidation Before Consolidation Was Permitted To Present Its Case.

The Virginia Supreme Court's ruling directly contradicts this Court's settled precedent. In fact, this Court essentially decided the exact issue presented in this case nearly 100 years ago in *Saunders v. Shaw*, 244 U.S. 317 (1917). In *Saunders*, this Court held that a state court violates the Due Process Clause of the Fourteenth Amendment when it rules against a party without affording the party an opportunity to present evidence in its own defense. 244 U.S. at 319. Certiorari is thus warranted to ensure that settled precedent of this Court is followed.

The facts in *Saunders* mirror the facts here. As here, the case began in state trial court as a request for injunctive relief. *Id.* at 318. In both cases, upon the close of plaintiff's evidence, the trial court ruled against the plaintiff for failure to prove its case. In *Saunders*, the trial court ruled that plaintiff's key evidence was inadmissible. *Id.* Here, the trial court found that Levisa failed to prove irreparable harm and failed to prove that Consolidation's actions were improper under the 1956 Lease. App. 36a–37a. In both cases, the trial court then ended the injunction proceedings by entering final judgment for the defendants after hearing solely the plaintiff's evidence. 244 U.S. at 318–19; App. 30a–31a. The

defendants in both cases, then, had no opportunity or need to introduce evidence in the trial court.

Both cases were appealed. In *Saunders*, the Louisiana Supreme Court reversed based on an intervening decision in a different case. 244 U.S. at 319. In this case, the Virginia Supreme Court disagreed with the trial court's holding on the scope of rights under the 1956 Lease. App. 22a. The key point is that in both cases instead of remanding to allow the defendant to present evidence in the first instance, the state supreme court reversed the judgment and ruled against the defendant on the merits. In *Saunders*, the state court proceeded to enter an injunction. 244 U.S. at 319. Here, the state court ruled against Consolidation on a central issue in the case—the interpretation of the 1956 Lease—leaving to the trial court on remand only the question whether a permanent injunction was the appropriate remedy. App. 24a.

This Court unanimously reversed in *Saunders*, and it should reverse here. The Court in *Saunders*, per Justice Holmes, held that the Due Process Clause required a remand to allow the defendant to present its evidence. 244 U.S. at 319–20. Even though the newly issued state precedent could have rendered remand "an empty form," this Court nevertheless concluded that it could not "be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Id.* at 319.

This Court subsequently has found it necessary to re-affirm the same principle on several occasions—it violates due process for a court to rule on the merits of a claim against a party if that party has not had an opportunity to present its case. *See, e.g.*,

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678 (1930) (a Missouri state court deprived a party of due process because the party never "had an opportunity to defend" in the action); *Georgia Ry. & Elec. Co. v. City of Decatur*, 295 U.S. 165, 171 (1935) (holding that a court's refusal "to receive or consider" proof violates due process).

The Virginia Supreme Court's decision now makes it necessary for the Court to reaffirm that principle yet again. The decision below directly contradicts settled precedent. Indeed, this case arguably presents an even more egregious due process violation than *Saunders*. There can be no suggestion here that remand might be merely "an empty form." To the contrary, remand would allow Consolidation to introduce into evidence the 1908 Deed and the Pobst/Combs Deed, two essential documents in the chain of title that are vital for determining the parties' respective rights under the 1956 Lease. *Cf. Evans v. Indus. Accident Comm'n*, 162 P.2d 488, 489 (Cal. App. 1945) (holding, under *Saunders*, that the refusal to hear evidence on the "controlling issue" in the case violated due process). Indeed, these two documents conclusively establish Consolidation's right to store water in the VP3 mine.

The 1908 Deed conveyed to Prater Coal the right to use the Buchanan Parcels (which include the VP3 mine) "as may be necessary for removing the said coal or other minerals *from this and any other lands mined or leased* by the said party of the second part or assigns, and for other purposes incident to the operations herein contemplated." App. 51a–52a (emphasis added). The Pobst/Combs Deed conveyed to Pobst and Combs "all of the real estate" obtained

by Prater Coal in the 1908 Deed, "*together with all rights and easements* appurtenant o[r] incident thereto." App. 48a (emphasis added).

Pobst and Combs then specifically conveyed to Levisa all of the rights they had just obtained, including "all of the coal . . . together with *all rights, privileges and easements* appurtenant or incident thereto which were acquired [in the Pobst/Combs Deed]." App. 46a (emphasis added). The "rights" and "privileges" conveyed in the 1937 Deed thus included *all* of the rights that had been conveyed in the Pobst/Combs Deed and 1908 Deed, including the right to use the VP3 mine "as may be necessary for mining the said coal or other minerals *from this and any other lands mined or leased*." (emphasis added). This right was then passed on from Levisa to Island Creek (and then to Consolidation) through the 1956 Lease.

Because the Virginia Supreme Court did not have the 1908 Deed and the Pobst/Combs Deed, it could not see that the rights and privileges included in the 1937 Deed (and thus the 1956 Lease) included the right to use the VP3 Mine as necessary to mine other lands. The incomplete record led the court to reach the flatly mistaken conclusion that "the [1937] deed did not expressly convey to Levisa Coal the right to use any part of the estate . . . to support mining activities on other lands." App. 3a. As explained above, properly read in light of the 1908 Deed and the Pobst/Combs Deed, the 1937 Deed conveyed precisely that right.

Ironically, the court acknowledged that "the procedural posture of the case . . . resulted in an insufficient record for this Court to resolve the issue

of Levisa Coal's entitlement to injunctive relief." App. 23a. But the court failed to recognize that the same insufficient record made it impossible for the court to comply with due process requirements when it reached out to decide the critical issue it did reach—the interpretation of the 1956 Lease.

The important point here is not that allowing Consolidation an opportunity to introduce the 1908 Deed and the Pobst/Combs Deed will change the ultimate decision on the merits. Instead, the critical point is that this Court's precedent and the Due Process Clause require that Consolidation be allowed *the opportunity* to submit this evidence and have it considered by the state court before Consolidation's rights are finally determined. As this Court has stated:

> We are not now concerned with the rights of the plaintiff on the merits . . . . Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense—whether it has had an opportunity to present its case and be heard in its support.

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 681 (1930). Consolidation was not afforded this opportunity, both because it never had an opportunity to present its evidence and because it was never given a chance to present or prove its affirmative defenses. *See Lindsey v. Norment*, 405 U.S. 56, 66 (1972) ("Due process requires . . . an opportunity to present every available defense.").

The state court's ruling thus directly contradicts this Court's holding in *Saunders*. This conflict is a compelling reason to grant the writ. *See, e.g., Kirk v.*

Louisiana, 536 U.S. 635, 635–36 (2002) (granting certiorari and reversing because "[t]he [Louisiana] court's reasoning plainly violates our holding in *Payton v. New York*, 445 U.S. 573, 590 (1980)); *William E. Arnold Co. v. Carpenters Dist. Council*, 417 U.S. 12, 14 (1974) (granting certiorari "to decide whether the holding of the Florida Supreme Court was consistent with decisions of this Court"). If the Court does not exercise the writ when lower courts act in such direct contravention of its precedents, the Court's constitutional rulings would have little impact on how the law is actually applied.

Finally, there can be no doubt that the due process issue raised here is properly before the Court. Just as in *Saunders*, the due process question did not arise until the state supreme court issued its opinion deciding an issue against the party that had been given no opportunity to present evidence in the trial court. 244 U.S. at 320. Consolidation raised this issue at its first opportunity—its petition for rehearing in the Virginia Supreme Court—which preserved the issue for review by this Court. *Id.*; *see also Herndon v. Georgia*, 295 U.S. 441, 444 (1935) ("There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it.").

At stake in this case is the vital principle that, "while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law." *Brinkerhoff-Faris*, 281 U.S. at 682. By ruling that Consolidation had no right to store water in the VP3 mine before Consolidation had *any*

opportunity to present its defense and introduce key documents into evidence, the Virginia Supreme Court contradicted this Court's long-settled precedent and violated Consolidation's core due process rights. Certiorari is warranted to enforce the settled rulings of this Court and to allow Consolidation to return to state court and be given a chance in the first instance to prove its case.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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APPENDIX

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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 18th day of September, 2008.

Levisa Coal Company,

Appellant,

against

Record No. 070580
Circuit Court No. CL 06-408

Consolidation Coal Company, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 6th day of June, 2008 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court.*

Deputy Clerk

Present: All the Justices

LEVISA COAL COMPANY

v. Record No. 070580

CONSOLIDATION COAL COMPANY

FROM THE CIRCUIT COURT OF BUCHANAN COUNTY
Keary R. Williams, Judge

OPINION BY
JUSTICE LAWRENCE L. KOONTZ, JR.
June 6, 2008

This appeal arises from a dispute between the owner of a solid mineral estate subject to a long-term mining lease and a third party. The dispute involves the storage of wastewater from the third party's mining operations on other lands in a particular mine located within the subject leasehold but with the lessee's permission. The owner of the solid mineral estate sought an injunction and declaratory judgment to prevent the third party from using the mine, which had been idled by the lessee, as a wastewater storage pit. We consider whether the circuit court erred in adjudicating that the third party "has a right to store excess water" from its mine in the mine in question and in denying the requested injunctive relief.

BACKGROUND

In 1937, Levisa Coal Corporation, the predecessor in interest to Levisa Coal Company, the plaintiff-appellant herein, acquired by severance deed the solid mineral estate and timber rights on various parcels of land in Buchanan County ("the Buchanan County parcels").[1] The severance deed conveyed to Levisa Coal ownership of "the coal, metals and timber, together with all the rights, privileges and easements incident thereto, in, on or under" the lands described in the deed. However, the severance deed did not expressly convey to Levisa Coal the right to use any part of the estate conveyed or the attendant easements to support mining activities on other lands. By a separate and subsequent severance deed, the rights to the oil and gaseous mineral estates of the Buchanan County parcels were conveyed to another party. Levisa Coal later acquired an interest in these estates through an oil, gas and coalbed methane lease.

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[1] Because, for purposes of this appeal, there is no significant distinction between these two entities, we will refer to the owner of the solid mineral estate as "Levisa Coal" without distinction as to whether the reference is to the current owner or its predecessor in interest.

In 1956, Levisa Coal entered into a lease with Island Creek Coal Company (Island Creek Coal) granting that company "the sole and exclusive right and privilege of mining and removing all of the coal from all the seams underlying the Tiller [V]ein or seam of coal or the horizon of such seam" in and upon the Buchanan County parcels conveyed by the 1937 deed.[2] The 1956 lease further provided Island Creek Coal with the right "generally, to make any use of the leased premises which [Island Creek Coal] may deem needful or convenient in carrying on its mining or other operations." Among the specific uses permitted was the right to "dump water or refuse on said premises." These rights, however, were "limited to such rights as [Levisa Coal] owns and has the right to lease," and the lease did not expressly purport to convey any right to use the leasehold for the support of mining operations on other lands.

Under the 1956 lease, Levisa Coal retained certain rights to the ownership and continued use of its solid mineral estate below the Tiller Vein and to easements serving Island Creek Coal's leasehold. As

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[2] The "Tiller Vein" refers to a particular deep-lying coal seam that has been identified by that name in geological surveys of western Virginia for at least the last ninety years. See, e.g., H. Hinds, The Geology and Coal Resources of Buchanan County, Virginia, Bulletin XVIII (VA Geol. Survey 1918).

relevant to this appeal, Levisa Coal retained "[t]he entire ownership and control of all the leased premises, and the coal . . . and other minerals and products therein and thereon, for all purposes (except those hereinbefore expressly set forth as leased to [Island Creek Coal])." Additional express rights reserved to Levisa Coal included "the right and privilege of draining water . . . over, across, or through the leased premises," as well as "the right and privilege of searching for oil, gas, or any other minerals or products and removing same when and wherever found." In furtherance of these rights, the lease provided that Levisa Coal could make excavations and bore "slopes, shafts, drifts, tunnels, and wells" so long as these operations did not interfere with Island Creek Coal's right under the 1956 lease to remove coal from below the Tiller Vein. Levisa Coal also retained a right of inspection within Island Creek Coal's works and mines to assure compliance with an agreed upon mining plan and calculation of royalties due under the lease and "to use freely the means of access to the said works and mines without hindrance or molestation" consistent with its rights under the 1937 deed.

The initial term of the 1956 lease was for five years with the lease automatically renewing for successive terms of twenty years so long as Island Creek Coal fulfilled its obligation to mine coal on the property and pay royalties to Levisa Coal, or in lieu thereof to make minimum payments to Levisa Coal for the lost opportunity if coal was not being mined.

At issue in this appeal is a mine designated by Island Creek Coal as the "VP3 Mine," which was opened on land subject to the 1956 lease in 1968. Although Island Creek Coal suspended its mining operations at the VP3 Mine in 1998, Levisa Coal does not contend that Island Creek Coal has failed to pay royalties or fulfill its other obligations under the lease and, thus, under its terms the lease remains in force until at least 2021. Moreover, Levisa Coal, through its managing general partner John C. Irvin, conceded during the proceedings of this case that it is not presently economically feasible to resume coal mining operations at the VP3 Mine.

In 1993, CONSOL, Inc. (CONSOL), a subsidiary of CONSOL Energy, Inc., acquired Island Creek Coal and all of its assets, including the rights and obligations of the 1956 lease. CONSOL has maintained Island Creek Coal as a separate corporate entity, although Island Creek Coal no longer has any active mining operations or employees and its corporate officers are also officers or employees of CONSOL or its subsidiaries. CONSOL is also the parent company of Consolidation Coal Company (Consolidation Coal), the defendant-appellee herein. Consolidation Coal maintains a coal mining operation, designated as the "Buchanan Mine" or "Buchanan No. 1 Mine" in the vicinity of Island Creek Coal's VP3 Mine as well as other idled mines once operated by Island Creek Coal.

Excess ground water naturally flowing into any deep mine as a result of mining operations hampers extraction of coal. Mine operators routinely remove such excess water or wastewater on a daily basis. The removal of excess water in the Buchanan Mine, as well as the excess water in the VP3 Mine, was initially accomplished by pumping that water directly into the nearby Levisa River or one of its tributaries. At some point after the acquisition of Island Creek Coal by CONSOL, it became necessary for Consolidation Coal to devise an alternate drainage system for the removal of excess water naturally flowing into its Buchanan Mine and the additional water released into that mine as a result of its continuing mining operations there. In general terms, the drainage system devised by Consolidation Coal involved pumping the excess water from the Buchanan Mine into a series of nearby idled mines once operated by Island Creek Coal which functioned as storage pits for the water until the water could be pumped into the Levisa River. Ultimately, this drainage system was designed to include the idled VP3 Mine. The rate of discharge of the wastewater into the river was to be limited from time to time so that the Levisa River could accommodate the increased water flow resulting from this discharge.

Ultimately, the chloride content of the anticipated discharged water into the Levisa River became an issue to be resolved in order for Consolidation Coal to comply with certain water standards established by the State Water Control

Board and to obtain the necessary permits to allow it to continue to pump mine water into the Levisa River. Consolidation Coal applied to the Virginia Department of Mines, Minerals, and Energy (DMME) for permits to discharge wastewater from the Buchanan Mine into idled mines under Island Creek Coal's control, including the VP3 Mine, and ultimately into the Levisa River in accord with its designed drainage system.[3] Subsequently, Consolidation Coal began discharging wastewater into the "Beatrice" and "VP1" mines and, when these mines could not accommodate additional water, the discharge was diverted to the VP3 Mine. The present rate of wastewater discharge from the Buchanan Mine into the VP3 Mine is nearly 2,500 gallons per minute. The VP3 Mine has a capacity to hold approximately 6.4 billion gallons of wastewater.

On July 10, 2006, Levisa Coal filed a complaint for injunctive relief and declaratory judgment against Consolidation Coal in the Circuit Court of Buchanan County seeking to prohibit Consolidation Coal from continuing to divert wastewater from the

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[3] According to statements in the record, Levisa Coal, by separate litigation, challenged the issuing of a permit by DMME to allow discharge of water into the VP3 Mine. The record does not disclose the current status or result of that litigation.

Buchanan Mine to the VP3 Mine. In seeking temporary and permanent injunctive relief, Levisa Coal maintained that "[t]he proposed pumping and storage of Buchanan Mine water in Levisa [Coal]'s properties will cause irreparable harm to Levisa [Coal]'s property and business interests." Specifically, Levisa Coal maintained that storing water in the VP3 Mine would result in absorption of coal bed methane gas and, with regard to the remaining coal in the property, would "vastly increase the costs that will be required in order to safely access and mine the coal in the future, effectively making it unminable." Levisa Coal further maintained that it had no adequate remedy at law to redress these alleged injuries.

Levisa Coal premised its action for declaratory judgment on the assertion that Consolidation Coal "lacks the legal right to pump and store its Buchanan Mine water in the [VP3 Mine]." It sought a declaration that Consolidation Coal "has no right to utilize Levisa [Coal]'s subject properties for temporary or permanent storage of Buchanan Mine water, and for judgment adjudicating all other issues expressly or inferentially raised."

On August 4, 2006, Consolidation Coal filed an omnibus response to the complaint, supported by an accompanying memorandum of law, asserting a demurrer, special plea in bar, answer and affirmative defenses. As relevant to this appeal, Consolidation Coal maintained that it had a legal right to discharge wastewater into the VP3 Mine

because Island Creek Coal, consistent with its purported rights under the 1956 lease, had agreed to permit Consolidation Coal to discharge the water into the VP3 mine. Consolidation Coal further maintained that Levisa Coal was not entitled to seek an injunction as it was not suffering any harm from the discharge of water into Island Creek Coal's leasehold, or, in the alternative, even if Levisa Coal were being injured by that action, it had an adequate remedy at law in the form of seeking monetary damages now or in the future.

The parties engaged in a lengthy period of discovery before Levisa Coal sought a hearing to request entry of a preliminary injunction. The circuit court conducted an ore tenus hearing on the request for a preliminary injunction on November 15 and 16, 2006. At that hearing, Levisa Coal took the position that, despite any agreement between Consolidation Coal and Island Creek Coal by which Island Creek Coal would purportedly accept responsibility for the dumping of water into the VP3 Mine, "it is Consolidation Coal Company that is doing it." Levisa Coal maintained that the 1956 Lease provided Island Creek Coal with the right to mine coal, but provided no right for Island Creek Coal to permit Consolidation Coal to put water into the mine.

In response, Consolidation Coal took the position that it was Island Creek Coal, not Consolidation Coal, that was actually putting water into the VP3 Mine and that Island Creek Coal was doing so in a

manner consistent with its rights under the 1956 lease. Consolidation Coal noted that even prior to the acquisition of Island Creek Coal by CONSOL, the two companies had cooperated in their respective mining efforts in the region. Consolidation Coal maintained that both companies had benefited from, and continued to benefit from, arrangements whereby mining operations on the lands and leaseholds of one were supported by activities on the lands and leaseholds of the other. In this context, Consolidation Coal asserted that Island Creek Coal's storage of the Buchanan Mine water in the VP3 Mine was a "use of the leased premises which [Island Creek Coal] may deem needful or convenient in carrying on its mining or other operations" as contemplated by the 1956 lease.

Consolidation Coal further contended that even if it, and not Island Creek Coal, were deemed to be the party responsible for the inundation of the VP3 Mine, it was doing so only within the voids, tunnels and shafts created in Island Creek Coal's leasehold below the Tiller Vein and, thus, in an area over which Levisa Coal had no current possessory interest. Thus, Consolidation Coal contended that Levisa Coal did not have standing to seek any relief against Consolidation Coal. Moreover, assuming that Levisa Coal had such standing, to the extent that it might suffer some damage to its interest in the gaseous mineral estate, which Consolidation Coal did not concede, Consolidation Coal maintained that such damage was a quantifiable harm for which

Levisa Coal could seek a monetary award at law. As to any other damages Levisa Coal might suffer as a result of impairment of its retained rights under the 1956 lease, Consolidation Coal maintained that these damages were "speculative" because the VP3 Mine was currently idle and there was no prospect of it being reopened for coal production or any other purpose. Thus, Consolidation Coal maintained that Levisa Coal could not establish irreparable harm for which injunctive relief should be granted.

Levisa Coal introduced evidence through testimony from Irvin, from Gerald Ramsey, a former employee of Island Creek Coal now employed by CONSOL Energy, from Andrew Cecil, a mining engineer, and from Charles Earl Ellis, a former employee of Island Creek Coal now working as an independent consultant who was qualified as an expert on business operations in the mining industry. We need not recount the substance of this testimony in detail, it being sufficient to say that Irvin, Ramsey and Ellis confirmed the history of the VP3 Mine and the relationship between Island Creek Coal and Consolidation Coal as related above. Additionally, Irvin testified concerning Levisa Coal's interest in the production of coal bed methane gas on the Buchanan County parcels.

Cecil's testimony provided support for Levisa Coal's contention that inundation of the voids, tunnels and shafts in the VP3 Mine would significantly impair the coal reserves of Levisa Coal in that portion of its estate and the adjoining strata.

Cecil opined, for example, that water in the VP3 Mine would be absorbed into the sandstone and shale layers above and below the coal seam, creating "issues" for the stability of the roof and floor of the mine, affecting the use of the mine tunnels and shafts for future access to the coal reserves in the strata below the Tiller Vein as well as increasing the cost of mining those reserves.

Levisa Coal also sought to introduce evidence of the potential damage to the gaseous mineral estate of the Buchanan County parcels in the form of an affidavit prepared by Timothy L. Hower. Levisa Coal contended that Hower was unavailable to testify in person because he was outside the United States on other business. Levisa Coal averred that it had attempted to make Hower available for cross-examination by deposition or by having the hearing conducted on a date when he would have been available, but contended that Consolidation Coal had "refused" to take Hower's deposition and implied that other difficulties with the discovery process had delayed the hearing until Hower was unavailable. Consolidation Coal responded that its objection was not merely that Hower was unavailable for cross-examination, but because the substance of his opinion as outlined in the affidavit was "speculative." The circuit court indicated that it would not "rul[e] on the substance of the affidavit," but that it would nonetheless exclude it from evidence because "it is patently unfair to allow this witness to testify by

affidavit without giving defendant's counsel the opportunity to cross examine."

Following the circuit court's ruling excluding Hower's affidavit, Levisa Coal rested its case in chief. Consolidation Coal then moved to strike Levisa Coal's evidence, contending that Levisa Coal had failed to establish that it would suffer any irreparable harm if the temporary injunction were not granted. This was so, Consolidation Coal maintained, both because the injury from the alleged trespass was merely speculative and, if actual, could be redressed by monetary damages awarded at law.

In addressing the motion to strike Levisa Coal's evidence, the circuit court stated that in its view the principal claim made by Levisa Coal with respect to the harm it would suffer from the inundation of the VP3 Mine was to "its coal and gas estate, although it is contested that it has a gas estate . . . there is some evidence here where the Court may conclude as much." The court concluded, however, that any damages to Levisa Coal's interests were quantifiable and, thus, it "has an adequate remedy at law if it in any way lost its coal estate, . . . gas or coal bed methane estate." The court further concluded that granting the preliminary injunction could result in "astronomical" harm to Consolidation Coal in that it possibly would be required to suspend operations at the Buchanan Mine. Accordingly, the court ruled that Levisa Coal had not met its evidentiary burden for obtaining a preliminary injunction.

The circuit court then ruled that the provision in the 1956 lease that granted to Island Creek Coal "use of the leased premises which lessee may deem needful or convenient in carrying out its mining operations or other operations" was "about as broad and expansive as we might imagine." Applying that interpretation of the lease, the court ruled that with respect to the declaratory judgment Consolidation Coal "has the right to place any kind of storage water in the [VP3] [M]ine." Accordingly, the court indicated that it did not need to hear evidence from Consolidation Coal's witnesses and directed counsel for Consolidation Coal to draft an order reflecting the court's rulings.

On December 13, 2006, counsel for Consolidation Coal submitted a draft order adopting by reference the circuit court's summation at the conclusion of the hearing and, in addressing the court's ruling on the declaratory judgment issue, reflecting that Levisa Coal had "requested in this hearing that the Court construe the November 16, 1956 Lease, and the rights imparted therein." On December 20, 2006, counsel for Levisa Coal submitted a lengthy set of written objections to the court's anticipated rulings as reflected in the court's summation and the draft order.

On December 22, 2006, the circuit court entered a separate order, which simplified the language of the draft order submitted by Consolidation Coal, but in substance reflected the court's rulings on Levisa Coal's requests for a preliminary injunction and

declaratory relief. On the latter issue, the court expressly ruled that Consolidation Coal "has the right to store excess water from the Buchanan No. 1 [Mine] in the VP3 Mine." Although the draft order had not done so, the court's order further provided that it was a final order "resolving all issues between the parties." Pursuant to Rule 1:13, the order was entered without endorsement of counsel "with the understanding that all objections the Parties have stated in the record are hereby preserved" including Levisa Coal's written objections submitted on December 20, 2006. We awarded Levisa Coal this appeal.

DISCUSSION

Levisa Coal has asserted 12 assignments of error to a number of aspects of the circuit court's conduct of the hearing held in this case and its final judgment. However, given the procedural posture of this case, we are of opinion that we need not address all of these assignments of error. As we have previously noted, the hearing was noticed on Levisa Coal's request for a temporary injunction. The circuit court ruled on the merits of the request for a declaratory judgment and denied injunctive relief after sustaining Consolidation Coal's motion to strike the evidence at the conclusion of Levisa Coal's evidence in chief. Accordingly, the resolution of

Levisa Coal's appeal rests principally upon two issues.[4] First, we will consider whether the circuit

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[4] While the petition for appeal in this case was under review, Consolidation Coal filed a motion to dismiss the petition for appeal and a renewed motion to dismiss. In those motions, Consolidation Coal contends that because the ruling on the declaratory judgment had been made at Levisa Coal's request, as recited in the circuit court's order, and Levisa Coal had not then sought a reconsideration of that ruling, it is barred from seeking review of that ruling on appeal. At oral argument of this appeal, counsel for Consolidation Coal again asserted that by requesting the inclusion of the court's ruling in the order, Levisa Coal is barred from pursing an appeal on this point. We disagree.

It is entirely proper for a party to request that a court memorialize in an order a ruling made from the bench, even when that ruling is contrary to the party's interest. Levisa Coal noted its objection to the court's interpretation of the 1956 lease as permitting the storage of water from any source within the VP3 Mine in the written objections submitted to the court prior to the entry of the final order, and those objections were expressly preserved by reference in that order. Thus, it was not necessary for Levisa Coal to renew its objection by a motion for reconsideration or any other means after entry of the final order. See, e.g., Chawla v. BurgerBusters, Inc., 255 Va. 616, 621-23, 499 S.E.2d 829, 832-33 (1998) (error preserved by plaintiff's written motion and supporting oral argument when objection noted on circuit court's final order). Accordingly, to the extent we have not already disposed of the matter by granting the petition for appeal, Consolidation Coal's motion to dismiss and renewed motion to dismiss are denied. Similarly, we find no merit to Consolidation Coal's contention made on brief of this appeal that Levisa Coal's written objections did not

court correctly construed the 1956 lease as providing Island Creek Coal, and, by extension, Consolidation Coal through Island Creek Coal's permission, with "the right to store excess water from the Buchanan No. 1 [Mine] in the VP3 Mine." Second, if the 1956 lease does not provide Island Creek Coal with the right to permit Consolidation Coal to store excess water from the Buchanan Mine in the VP3 Mine, we will consider whether the record supports the circuit court's denial of Levisa Coal's request for injunctive relief.

Interpretation of the 1956 Lease

Like all leases, a mining lease is a contract and "when the terms of a contract are clear and unambiguous, a court must give them their plain meaning." Pocahontas Mining L.L.C. v. Jewell Ridge Coal Corp., 263 Va. 169, 173, 556 S.E.2d 769, 771 (2002). On appeal, we review a trial court's interpretation of a lease under a de novo standard. See Eure v. Norfolk Shipbuilding & Drydock Corp., 263 Va. 624, 631, 561 S.E.2d 663, 667 (2002) ("on appeal we are not bound by the trial court's interpretation of the contract provision at issue; rather, we have an equal opportunity to consider the

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satisfy the contemporaneous objection requirement of Rule 5:25.

words of the contract within the four corners of the instrument itself"); Wilson v. Holyfield, 227 Va. 184, 187-88, 313 S.E.2d 396, 398 (1984).

Levisa Coal contends that the circuit court misinterpreted the language of the lease allowing "any use of the leased premises which [Island Creek Coal] may deem needful or convenient in carrying on its mining or other operations" as permitting the support of mining operations on other lands. Levisa Coal initially notes that, under Clayborn v. Camilla Red Ash Coal Co., 128 Va. 383, 105 S.E. 117 (1920), the 1937 deed conveying to it the solid mineral estate of the Buchanan County parcels permitted only a "necessary incidental easement" for purposes of removing the coal and other minerals. Id. at 390, 105 S.E. at 119. Thus, Levisa Coal maintains that it did not obtain the right under the 1937 deed to support mining operations on other lands by permitting the inundation of the subsurface area with wastewater. Accordingly, Island Creek Coal could not have obtained the right to do so within its leasehold because the 1956 lease expressly limited the easements Levisa Coal granted to Island Creek Coal "to such rights as [Levisa Coal] owns and has the right to lease." We agree with Levisa Coal.

In Clayborn, we were required to determine, as a matter of first impression in Virginia, whether a

trespass had occurred against the rights of the owner of the surface estate[5] where the owner of the severed coal estate was transporting coal from adjacent mining operations on other lands through the tunnels and shafts beneath the surface estate. We recognized that under "[t]he prevailing if not wholly unbroken current of authority . . . a grantee of coal in place is the owner, not of an incorporeal right to mine and remove, but of a corporeal freehold estate in the coal, including the shell or containing chamber, and that as such owner he has the absolute right, until all of the coal has been exhausted, to use the passages opened for its removal for any and all purposes whatsoever, including in particular the transportation of coal from adjacent lands, so long as he operates and uses the passages with due regard to the rights of the surface owner." 128 Va. at 388, 105 S.E. at 118.

After extensively reviewing the law from other jurisdictions, we held that a deed or lease

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[5] "Surface estate" is a term intended generally to refer to the rights of the owner of that portion of the original tract of land that has not been severed by deeds granting rights in the mineral estate or other resources of the tract of land. As Clayborn made clear, the rights of the surface owner are not limited to control of the surface area, but, depending on what rights are retained, may extend into the subsurface area. Clayborn, 128 Va. at 388, 105 S.E. at 118.

transferring a coal estate or portion thereof is "the grant of an estate determinable [and w]hen the coal is all removed the estate ends for the plain reason that the subject of it has been carried away." Id. at 393, 105 S.E. at 120. Thus, "[t]he space [the coal] occupied reverts to the grantor by operation of law." Id. Accordingly, we concluded that the right to use the tunnels and shafts extended only to the mining operations within the determinable estate, and not to the support of mining operations on other lands. We further held that "[i]f the coal owner expects more" than the right to mine and remove the coal within his estate "he ought to stipulate for it" in the deed or lease. Id. a t 397, 105 S.E. at 122.

Although our decision in Clayborn was not consistent with the majority view of other jurisdictions , see id. at 401-02, 105 S.E. at 123 (Prentis, J, dissenting), with respect to the issue in this case that decision is in line with the long established view in American law that "[t]he owner of a mine . . . may allow the water therein to flow in natural channels and percolations into an adjoining mine, but he may not, in absence of an easement or license to do so, discharge [water] by means of artificial drains into such adjoining mine." Daniel M. Barringer and John S. Adams, The Law of Mines and Mining in the United States 631 (1900). This principle applies both to mines at different levels within the same subsurface area of a single tract of land as well as to mines on different tracts of land.

We can discern no practical distinction between supporting adjoining mining operations by using tunnels and shafts to transport coal, as in Clayborn, and the storing of wastewater from such operations in the voids, tunnels and shafts of an unrelated mine, as in this case. Accordingly, we are of opinion that when the 1937 deed conveyed the solid mineral estate of the Buchanan County parcels to Levisa Coal, the parties to that deed contemplated only that the coal and other minerals would be mined from that estate, and that the deed conveyed only an incidental easement to use that portion of the parcels retained by the surface owner as was necessary to support such mining operations. Nothing in the deed conveyed any right to use the voids, tunnels and shafts created below the surface for any purpose other than to support the mining operations on those parcels.

Since the 1937 deed conveyed no right to use any portion of the mineral estate to support mining operations on other lands, the 1956 lease could not have granted such right to Island Creek Coal. Accordingly, even if we were to accept Consolidation Coal's argument that there was an incidental benefit to Island Creek Coal's long-term operational plan for mining the Buchanan County parcels by permitting wastewater from the Buchanan Mine to be stored in the VP3 Mine, Island Creek Coal simply lacks the authority to permit Consolidation Coal to store wastewater from other mining operations in the VP3 Mine. Clearly, Island Creek Coal did not stipulate

for such a use of the leasehold in the 1956 lease, nor could Levisa Coal have granted such rights even if they had been sought. Thus, we hold that the circuit court erred in ruling that Consolidation Coal has a right to store wastewater from the Buchanan Mine in the VP3 Mine.

Denial of Levisa Coal's Request for Injunctive Relief

Because the circuit court premised its judgment to deny Levisa Coal's request for injunctive relief, at least in part, on its erroneous determination that Consolidation Coal had the right to store excess water from the Buchanan Mine in the VP3 Mine, we will reverse that judgment. Additionally, because the circuit court rendered that judgment in the procedural posture of the case which resulted in an insufficient record for this Court on appeal to resolve the issue of Levisa Coal's entitlement to injunctive relief, we will also remand the case for further consideration of that issue by the circuit court.

Upon appeal, Consolidation Coal has contended, as it did in the circuit court, that Levisa Coal lacks standing to seek injunctive relief in this case because the 1956 lease divested it of a present possessory interest in the leasehold given to Island Creek Coal. While the circuit court did not expressly address this contention, implicitly the court rejected it by reaching the merits of Levisa Coal's requested relief. The record sufficiently reflects that Levisa Coal's rights and interests are not limited to those of its retained ownership of the coal reserves below the

Tiller Vein that Island Creek Coal presently has a right to mine. In addition, Levisa Coal reserved the right to explore for and remove other minerals under the 1956 lease, and the circuit court found that there was sufficient evidence, even without Hower's affidavit, that inundation of the VP3 Mine with excess water from the Buchanan Mine would potentially damage the coal bed methane and other gas deposits associated with the VP3 Mine and adjoining strata in which Levisa Coal owns an interest. Accordingly, there is no merit to Consolidation Coal's contention that Levisa Coal lacks standing to seek injunctive relief in this case, and that contention will not be an issue upon remand of this case to the circuit court.

Levisa Coal's standing to seek injunctive relief in the present case, however, is not sufficient alone to establish an entitlement to such relief. Under well established principles, which will be applicable upon remand here, the granting of an injunction is an extraordinary remedy and rests on sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. See, e.g., Fancher v. Fagella, 274 Va. 549, 556, 650 S.E.2d 519, 522 (2007), Seventeen, Inc. v. Pilot Life Ins. Co., 215 Va. 74, 78, 205 S.E.2d 648, 653 (1974); Akers v. Mathieson Alkali Works, 151 Va. 1, 8, 144 S.E. 492, 494 (1928).

We also note that because of the absence of any right of Consolidation Coal to store excess water from its mine in the VP3 Mine and the evidence in

the record that it is currently doing so, the issue before the circuit court will no longer involve the consideration of temporary injunctive relief but, rather, whether the circumstances warrant the issuance of a permanent injunction.[6] In that regard, the circuit court may have the benefit of additional evidence on the issue of the damages that inundation of the VP3 Mine may cause to Levisa Coal's interests in the gaseous mineral estate associated with the VP3 Mine and the adjoining strata. Similarly, Consolidation Coal must be afforded the opportunity to present evidence to support its contention that Levisa Coal has an adequate remedy at law in the form of monetary damages resulting from the inundation of the VP3 Mine with wastewater from Consolidation Coal's mine.

The principles that a court must apply in properly exercising its discretion to grant or deny a permanent injunction have been identified in prior

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[6] In the circuit court Consolidation Coal urged the application of a four-factor approach for determining whether a preliminary injunction should issue, similar to that adopted by the United States Court of Appeals for the Fourth Circuit in Blackwelder Furniture Co. v. Seilig Manufacturing Co., Inc., 550 F.2d 189, 195-96 (4th Cir. 1977), for issues arising under F.R. Civ. P. 65. In the posture of this appeal it is not necessary to address that issue, and we express no view upon the matter.

decisions of this Court. "Under traditional equitable principles, a chancellor may enjoin a continuing trespass." Fancher, 274 Va. at 556, 650 S.E.2d at 522. See also Nishanian v. Sirohi, 243 Va. 337, 339, 414 S.E.2d 604, 606 (1992); Mobley v. Saponi Corporation, 215 Va. 643, 645, 212 S.E.2d 287, 289 (1975). However, even in a case involving a continuing trespass the guiding principle which remains constant is that the granting of an injunction is an extraordinary remedy and rests on the sound judicial discretion to be exercised upon consideration of the nature and circumstances of a particular case. See, e.g., Fancher, 274 Va. at 556, 650 S.E.2d at 522; Seventeen, Inc., 215 Va. at 78, 205 S.E.2d at 653; Akers, 151 Va. at 8, 144 S.E. at 494. Thus, in a case of a continuing trespass, such as the present case, we have stated that if "the loss entailed upon [the trespasser] would be excessively out of proportion to the injury suffered by [the owner], or a serious detriment to the public, a court of equity might very properly . . . deny the injunction and leave the parties to settle their differences in a court of law." Clayborn, 128 Va. at 399, 105 S.E. at 122.

We have also observed that unless a party is entitled to an injunction pursuant to a statute, a party must establish the "traditional prerequisites, i.e., irreparable harm and lack of an adequate remedy at law" before a request for injunctive relief will be sustained. Virginia Beach S.P.C.A., Inc. v. South Hampton Rds. Veterinary Assoc., 229 Va. 349,

354, 329 S.E.2d 10, 13 (1985); see also Carbaugh v. Solem, 225 Va. 310, 315, 302 S.E.2d 33, 35 (1983). Clearly, if the plaintiff has no adequate remedy at law, equity will not countenance a continuing trespass merely because the trespasser, or even the public at large, will be benefited by allowing the trespass to continue. See Frank Shop, Inc. v. Crown Cent. Petroleum Corp., 264 Va. 1, 7, 564 S.E.2d 134, 137 (2002).

When an injunction is sought to enforce a contract right concerning personal property, the plaintiff has a high burden of showing that the failure to enjoin the alleged improper action will result in irreparable harm for which the law will afford him no adequate remedy. See, e.g., Griscom v. Childress, 183 Va. 42, 47, 31 S.E.2d 309, 312 (1944); Langford v. Taylor, 99 Va. 577, 580, 39 S.E. 223, 224 (1901). Unless the plaintiff can demonstrate that the property it seeks to protect has some personal value of sentiment or other intangible quality that cannot be restored to him at law, Langford, 99 Va. at 580, 39 S.E. at 224, or that monetary damages would otherwise not make him whole, the court will deny the injunction because the legal remedy is sufficient. Moore v. Steelman, 80 Va. 331, 339-40 (1885). Accordingly, in such cases, the court will give due weight to the adverse effect of the injunction being granted on the defendant.

By contrast, when the injunction is sought to enforce a real property right a continuing trespass may be enjoined "even though each individual act of

trespass is in itself trivial, or the damage is trifling, nominal or insubstantial, and despite the fact that no single trespass causes irreparable injury. The injury is deemed irreparable and the owner protected in the enjoyment of his property whether such be sentimental or pecuniary." Boerner v. McCallister, 197 Va. 169, 172, 89 S.E.2d 23, 25 (1955); accord Fancher, 274 Va. at 556, 650 S.E.2d at 522-23; Clayborn, 128 Va. at 398-99, 105 S.E. at 122.

Thus, in Clayborn we did not find that the alleged harm to the defendant constituted "the exceptional grounds" needed to require the owner of real property rights to forgo those rights for a purely legal remedy. Id. at 399, 105 S.E. at 122. Even though it was apparent from the record that the defendant could have negotiated the right to use the property "upon reasonable terms," we held that the court could not impose such terms on the parties and, thus, the injunction ought to have been granted. Id. at 400, 105 S.E. at 123.

Similarly, in Blue Ridge Poultry & Egg Co. v. Clark, 211 Va. 139, 176 S.E.2d 323 (1970), we rejected the claim that an injunction ought not to issue to protect a landowner from a noxious intrusion of effluent onto his land from a neighboring industrial farming operation. Despite the fact that the chancellor had found that the damages to Clark's property were quantifiable in terms of lost rent, we nonetheless held that "[t]he doctrine of 'balancing of equities' must be viewed in light of our long-standing pronouncement that a

private landowner is to be protected for injuries he may sustain 'even though inflicted by forces which constitute factors in our material development and growth.' " Id. at 144, 176 S.E.2d at 327 (quoting Townsend v. Norfolk Ry. & Light Co., 105 Va. 22, 49, 52 S.E. 970, 978 (1906)).

By contrast, in Akers we found that where the trespass had essentially stopped by the time the case had come to trial, granting an injunction "would be of little benefit to the complainant and would cost the defendant $1,000,000.00." Akers, 151 Va. at 8, 144 S.E. at 494. In such a case, the availability of a remedy at law was clearly appropriate, and thus an injunction was not appropriate. Id.; see also Mobley, 215 Va. at 646, 212 S.E.2d at 290.

Upon remand the circuit court will be guided by these principles after granting the parties the opportunity to present evidence regarding them.

CONCLUSION

For these reasons, we will reverse the judgment of the circuit court and remand the case for further proceedings consistent with the views expressed in this opinion.

Reversed and remanded

VIRGINIA:

IN THE CIRCUIT COURT
OF BUCHANAN COUNTY

LEVISA COAL COMPANY,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No.
	)	CL 06-408
	)	
CONSOLIDATION COAL COMPANY,	)	
	)	
	)	
Defendant.	)	

ORDER

This cause came to be heard on the 16th day of November, 2006, upon Plaintiff's Motion for Injunctive Relief. The Court received Plaintiff's evidence and argument in support of such motion and Defendant presented argument and moved to deny Plaintiff's Motion for Injunctive Relief upon the close of Plaintiff's evidence.

Pursuant to the findings of fact and conclusions of law as stated by the Court from the bench, as recited in the transcript, dated the 16th day of November, 2006, the Court DENIES Plaintiff's Motion for Injunctive Relief and GRANTS Defendant's Motion.

Further, Plaintiff's Motion to Add Party Plaintiffs was presented and opposed by Defendant. For reasons stated by the Court from the bench, that Motion is also DENIED.

Further, upon request by the Plaintiff, the Court has construed the November 16, 1956 Lease, and the rights imparted therein, and for the reasons stated from the bench and in the record, the Court has adjudicated by declaratory judgment that Defendant has the right to store excess water from the Buchanan No. 1 in the VP3 Mine.

Endorsement of this Order by all Counsel of Record in this proceeding is waived pursuant to Rule 1.13 of the Rules of the Supreme Court of Virginia, with the understanding that all objections the Parties have stated in the record are hereby preserved and that Plaintiff's additional written Objections are attached to this Order as Appendix A, which is incorporated herein by reference.

It is ORDERED that the clerk of this Court mail a copy of this Order to all Counsel of Record. The Court further Decrees that this is a Final Order in this matter, resolving all issues between the parties, and that this matter shall be removed from the Court's docket.

Entered this ORDER this 22nd day of December, 2006.

/s/ Keary R. Williams
JUDGE

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF BUCHANAN

LEVISA COAL COMPANY, a Virginia Limited Partnership and L.L.P.,	:	
Plaintiff	:	Case No. CL06000408-00
–vs–	:	
CONSOLIDATION COAL COMPANY,	:	
Defendant	:	

November 16, 2006
9:00 a.m.

HEARD BEFORE:

THE HONORABLE KEARY R. WILLIAMS

* * *

THE COURT: No, I don't think that is proper. We could go backwards and forwards here all day. The Court has listened to the testimony and argument of counsel for one and two-thirds days now. I think we have probably postured this case to a point where the Court needs to direct its attention to the request and the motion that is before it, and that is the Motion to Strike after the plaintiff has rested.

I think it is important that, and I think counsel understands this, but any other person in this courtroom needs to understand that the Court has been requested to apply in the Virginia law an extraordinary remedy, an injunction, which is unusual, unique. And because of that fact and because of those circumstances, the Court has had, through the course of time, statutory case law and otherwise, some guidelines drawn for it in order to apply that extraordinary remedy.

And I think counsel for the defendant has adequately and correctly pointed out that primary in that regard is the fact that the burden is incumbent on the parties seeking that extraordinary remedy to establish the fact that there is irreparable harm occurring or about to occur if the Court doesn't apply the remedy.

Well, I have heard some impressive testimony from Charlie Ellis and Andy Cecil in particular

regarding that harm. The harm is that, if the Court fails to apply the remedy, the confluence of the water through this system that is contemplated that is not yet in place by Consol will bar and take away the interest of Levisa Coal Corporation in its coal and gas estate, although it is contested that it has a gas estate. I think there is some evidence here where the Court may conclude as much.

But the fact of the matter is no one has challenged in the course of these proceedings Island Creek's, Island Creek Consol's action in idling the mine in question as VP-3, concluding obviously that it is not economically feasible to mine the coal at present. As a matter of fact, it may never be economically feasible to mine the coal estate of Levisa Coal Corporation.

What I have seen through the years, and that is based on a life expanse for me living in this county, is that I have seen conditions worsen in the market and coal mines shut down and people walk away from those coal seams saying, never mine that coal seam. In ten years' time companies, individuals go back, because the market has improved and they mine those coal seams and they mine with different technology and different methods. I have seen that happen in certain coal seams two or three times where the operator/producer will conclude that it is no longer economically feasible to mine a seam, give up, and leave it, and go back and mine it.

It is not inconceivable to me as I sit here today and I listen to all the testimony, that the coal identified as the Levisa Coal at VP-3 won't someday be mined because of economic feasibility or because it is practical to mine that coal.

I don't know what the proper methodology is going to be to mine that, whether it is going to be possible to go back through the VP-3 shaft, pump the water out, rehabilitate the mine and enter the premises in that direction or whether there is a likelihood that a new shaft will be sunk in order to or a new shaft sunk in order to access the coal. But I clearly see from the barriers and mine maps that the coal will be in place and not damaged by water, whether it is groundwater flowing into the mine or water is placed there by Consol or Island Creek in this instance.

If, in fact, the defendant wrongfully cuts that coal off in some fashion and established that it was economically feasible to mine that or some action subsequent took place that barred Levisa from its coal estates, it is clear based on the testimony that I have heard in the last day-and-a-half, that it is with certain, with almost more than reasonable accuracy you can conclude the tonnage in place, the lease provides a method for determining the value, then I think Levisa can calculate its damages. It has an adequate remedy at law if it in any way lost its coal estate with regard to the gas or coal bed methane estate, and I think Levisa acquired that through a settlement agreement with Oxi USA.

That agreement may have preceded some other ruling this Court has made which may have more clearly made it identifiable based on a single case that the Court previously adjudicated as to ownership of the coal bed methane might be, but at any rate, by contract and settlement agreement Levisa acquired a right to some of the royalties of the gas estate.

But I have listened to that testimony very carefully, and John Irvin has told us that he receives these periodic payments for production for approximately two months previous, one of those is in evidence that shows certainly a super gob area extraction point within VP-3 and we can identify, I think from those statements historically what volumes are being produced at that mine.

We are going to know as water fills that cavity or the void as to whether there is any diminishment in the gas estate as a result of placing water in there or using the void as a storage area so that you can then calculate the loss by getting, based on the previous numbers, a high low, a mean figure, and then applying the royalty rates to the per volume numbers. So that again, Levisa has an adequate remedy at law if, in fact, it loses its gas royalties.

The Court additionally would have to consider what the harm is to the defendant if the Court were to grant the extraordinary remedy, the injunction. Based on the testimony that the Court has heard it could be astronomical. It could have the effect of

shutting down Buchanan #1 which affects the employees, which dramatically would affect the economy of this country, which would dramatically affect, I am sure, the economy of the operator, Island Creek and Consol.

But primarily I think the plaintiff has been clearly unable to establish the irreparable harm element so the Court can get to that remedy.

A comment or two about the lease agreement. It would appear to the Court that the plaintiff is asking the Court to construe Exhibit Number 2, Plaintiff's Exhibit Number 2 and the rights imparted therein, in a very restricted manner and say those rights granted to the lessee applied only to the surface. And I've read that and I have attempted to read it and digest it even as counsel covered that portion of the lease.

I can't get beyond the fact that the latter part of that, after it grants and specifies and enumerates the rights that are granted incident to the estate is granted, that the closing part of that paragraph says, "To make use of the leased premises which lessee may deem needful or convenient in carrying out its mining operations or other operations." To the Court that is about as broad and expansive as we might imagine.

I can't imagine that with that language in the lease it was the intent of the lessor or Levisa to restrict those rights only to some type of surface mining operation. I think if the lessor felt that way,

that some issue would have been raised previously by the exercise of the underlying estate when it began to extract coal from the Pokey 3 seam. That obviously has never happened.

The long and short of that is the Court would deny the temporary injunction. The Court is asked to adjudicate, I think by declaratory judgment action, whether the defendant has the right to place any kind of storage water in the VP-3 mine. I think I probably addressed that already. But in order to clarify that, I would adjudicate that issue certainly in favor of the defendant.

Now, I imagine having said that, the witnesses that have been hanging around for a day-and-a-half can probably pack up and go home.

MR. ALLEN: Your Honor, would you like for us to prepare the suggested order and circulate it to Mr. Street and --

THE COURT: Yes, I would ask counsel for the defendant, Buddy Allen, to compile an order that reflects the Court's ruling. And thank you.

THE HEARING WAS CONCLUDED.

THIS INDENTURE OF LEASE, made this 16th day of November, 1956, between LEVISA COAL CORPORATION, a corporation (hereinafter called the Lessor), party of the first part, and ISLAND CREEK COAL COMPANY, a corporation, chartered, organized, and existing under the laws of the State of Maine (hereinafter called the Lessee), party of the second part;

W I T N E S S E T H:

That in consideration of the sum of Nine Thousand, One Hundred Fifty-seven Dollars and Fifty Cents ($9,157.50) cash in hand paid by the said Lessee to the said Lessor, the receipt whereof is hereby acknowledged, and in further consideration of the agreement to perform and observe the terms, conditions, covenants, stipulations and agreement hereinafter set forth to be performed and observed by the Lessee, and reserving as rents the royalties and other payments hereinafter provided for, and subject to the exceptions and reservations hereinafter set forth, the Lessor hereby leases, lets, and demises unto the Lessee for the period of five (5) years from the date hereof, the sole and exclusive right and privilege of mining and removing all of the coal from all the seams of coal underlying the Tiller vein or seam of coal or the horizon of such seam, in and upon these certain tracts or parcels of land in Buchanan County, Virginia, which were conveyed to the Lessor by H. Claude Pobst and wife F. H. Combs and wife by deed dated December 28, 1937, recorded

in the office of the Clerk of the Circuit Court of Buchanan County, Virginia, on December 28, 1937, in Deed Book 76, page 585. Reference is made to said deed for a more particular description of the land hereby leased.

The above described land is herein sometimes referred to as "leased premises" or "demised premises."

There are expressly excepted and reserved from the land above described and the terms of this lease all rights, estates, easements, and privileges therein and thereon heretofore granted by the party of the first part and/or its predecessors in title prior to the date hereof, and this leases is made subject to the rights of all other parties under existing and extant leases and other writings, including, but no limited to, the deed of Lease dated July 25, 1952, recorded in said Clerk's Office in Deed Book 121, at page 444, between Levisa Coal Corporation and Vansant Coal Corporation.

Also, the right and privilege of making such coal into coke and other products of coal, and of preparing for market, transporting, shipping, and selling said coal and coke and other products of coal.

Together with such use, possession, and control of so much of the surface of the leased premises owned by the Lessor as may reasonable be convenient to Lessee in carrying out its operations hereunder, including, but not being limited to, the right to erect and maintain thereon any and all buildings,

structures, and improvements that Lessee may deem needful or convenient in carrying on its operations hereunder, and the right to carry on upon said premises such incidental enterprises as stores, theatres, filling stations, pool and billiard halls, hospitals, meeting halls, schools, churches, and other enterprises of a similar character; together with the right to make excavations on the demised premises and to use on such premises (but not off the premises) any stone, sand, water, or other materials found thereon that Lessor may own, and to dump water or refuse on said premises, and to store coal thereon; the right to go upon the leased premises for the purpose of prospecting for said coal by any and all desirable means, including (but not restricted to) the boring of diamond drill holes; and, generally, to make any use of the leased premises which Lessee may deem needful or convenient in carrying on its mining or other operations.

Also, the right and privilege, but subject, nevertheless, to the rights, if any, heretofore granted by Lessor to others therefore, of cutting and using, for the operations under this lease, but for no other purpose, the timber and trees standing and fallen on the premises herein specifically described not exceeding twelve inches (12") in diameter, bark included, and not under five inches (5") in diameter, bark included, measured one foot (1') from the ground.

This lease is expressly made subject to all oil and gas leases and easements for roads, electric power

lines, telephone and telegraph lines, pipe lines, and railroads outstanding as of the date hereof; but Lessee, to the extent of the estates and privileges hereby leased, shall be entitled to exercise, and is hereby granted by Lessor, the benefit and the right to exercise all rights, privileges and estates excepted or reserved to the Lessor or grantors in the instruments granting such leases or easements, or not granted to the lessees or grantees therein:

With respect to the tracts contained in the leased premises wherein Lessor claims only the coal or minerals, the rights herein leased and demised to Lessee shall, with respect to such tracts, be limited to such rights as Lessor owns and has the right to lease on the date hereof or as it may acquire thereafter.

* * *

IN WITNESS THEREOF, the parties hereto have caused this Indenture of Lease to be duly executed as of the day and year first above written:

LEVISA COAL CORPORATION,

By
F.H. Combs, President.

ATTEST:
H. Claude Pobst
Secretary

ISLAND CREEK COAL COMPANY

By
R.E. Salvati, President.

ATTEST:
C.A. Rouse
Assistant Secretary

VIRGINIA, BUCHANAN COUNTY, to-wit:

In the Clerk's Office of the County and State aforesaid, the 28th day of December, 1937, at 10:00 o'clock A.M., the foregoing writing was presented and admitted to record, together with the annexed certificate of acknowledgment recorded in Deed Book No. 76, page 584.

TESTE: A. H. GOFF, CLERK,

By /s/, DEPUTY CLERK

THIS DEED, made and entered into on this 28th day of December, 1937, by and between H. Claude Pobst and Mary Alice Pobst, his wife, F. H. Combs, and Harriet R. Combs, his wife, parties of the first part and LEVISA COAL CORPORATION, a corporation, chartered, organized and doing business under and by virtue of the laws of the State of Virginia, party of the second part.

WITNESSETH: THAT for and in consideration of the sum of Two Hundred Dollars ($200.00), cash in hand paid, the receipt of which is hereby acknowledged, the said parties of the first part hereby grant and convey unto the said Levisa Coal Corporation all the coal, metals and timber, together with all rights, privileges and easements incident thereto, in, on or under the following described parcels of land, all situate, lying and being in

Buchanan County, Virginia, (those of said parcels of land which are described as being situate on Dry Fork of Big Prater Creek and on Right Fork of Big Prater Creek, being waters of Levisa Fork of Sandy River, being situate in Grundy Magisterial District of said County, and those of said parcels which are described as being situate on Hurricane Creek, Russell Fork River, Little Fox Creek of Russell Fork River, Big Fox Creek of Russell Fork River and Indian Creek of Russell Fork River, lying and being in Hurricane Magisterial District of said County) which said parcels of land are located on the following creeks and rivers, and contain the following number of acres, to-wit:

* * *

The foregoing parcels of real estate were conveyed to the Harrah Coal Land Company by A. D. Harrah and wife by deed dated April 25, 1908, and recorded May 5, 1908, in the Office of the Clerk of the Circuit Court of Buchanan County, Virginia, in Deed Book 34, page 475, et seq. reference to which deed is here made for a more particular description of said parcels of real estate.

* * *

Reference is here made to the foregoing deed and the recordation thereof for a more particular description of the aforesaid parcels of real estate.

It is the intention of this deed to convey and the said parties of the first part hereby convey unto the

said party of the second part of all of the coal, metals and timber, together with all rights, privileges and easements appurtenant or incident thereto which were acquired by the said H. Claude Pobst and F. H. Combs by deed from Prater Coal Land Company, a corporation, dated December 4, 1937, and recorded December 8, 1937, in the office of the Clerk of the Circuit Court of Buchanan County, Virginia, in Deed Book 76, page 521.

The parties of the First part hereby covenant to and with the party of the second part that they will warrant specially the property hereby conveyed.

Witness the following signatures and seals.

	H. Claude Pobst	(SEAL)
	Mary Alice Pobst	(SEAL)
REVENUE		
STAMP $0.50	F. H. Combs	(SEAL)
	Harriette R. Combs	(SEAL)

THIS DEED made and entered into on this the 4th day of December, 1937, by and between PRATER COAL LAND COMPANY, a corporation chartered, organized and doing business under and pursuant to the laws of the State of West Virginia, party of the first part and H. CLAUDE POBST and F. H. COMBS, parties of the second part.

WITNESSETH:

That for and in consideration of the sum of Ten Dollars ($10.00) cash in hand paid, the receipt of which is hereby acknowledged, the said party of the first part hereby grants and conveys unto the said H. Claude Pobst and F. H. Combs all of the coal, oil and gas as well as all such other minerals, metal and timber as the party of the first part may own or be entitled to in or upon the lands hereinafter identified, together with all rights, privileges and easements in, on or under the following described parcels of land all situate, lying and being in Buchanan County, Virginia (those of said parcels of land which are described as being situate on Dry Fork of Big Prater Creek and on Right Fork of Big Prater Creek, being waters of Levisa Fork of Sandy River, being situate in Grundy Magisterial District of said county, and those of said parcels which are described as being situate on Hurricane Creek, Russell Fork River, Little Fox Creek of Russell Fork River, Big Fox Creek of Russell Fork River and Indian Creek of Russell Fork River, lying and being in Hurricane Magisterial District of said County)

which said parcels of land are located on the following creeks and rivers, and contain the following number of acres, to-wit:

* * *

The foregoing parcels of real estate are the same real estate conveyed to Harrah Coal Land Company by A. D. Harrah and wife, by deed dated April 25, 1908, and recorded May 5, 1908, in the office of the Clerk of the Circuit Court of Buchanan County, Virginia, in Deed Book 34, pages 475 et seq., reference to which deed is here made for a more particular description of said parcels of real estate.

* * *

Reference is here made to the foregoing deed and the recordation thereof for a more particular description of the aforesaid parcels of real estate.

It is the intention of the deed to convey and the said party of the first part does hereby convey unto the said parties of the second part all of the real estate, together with all rights and easements appurtenant on incident thereto, owned by said party of the first part in Buchanan County, Virginia, whether hereinbefore mentioned and described or not.

Prater Coal Land Company, grantor herein, is the same corporation heretofore known as Harrah Coal Land Company, to which the aforesaid parcels of real estate were conveyed, the name of said

Harrah Coal Land Company having been changed, as provided by law, to Prater Coal Land Company.

The party of the first part covenants that it is seized and possessed of the aforesaid property and property rights and that it has the right to grant and convey the same; that it warrants generally its title thereto, except as to taxes, it being expressly understood that the conveyance hereby made is without warranty, either express or implied, on the part of the grantor in respect to taxes or any lien or claim charged or chargeable for taxes against the aforesaid property or any part of the same.

IN WITNESS WHEREOF Prater Coal Land Company has caused its name to be signed hereto by its President, and its corporate seal to be hereto affixed, attested by its Secretary, on the day and year first above written.

PRATER COAL LAND COMPANY,

By L. Epperly,
President.

ATTEST:

H. D. Everett,
Secretary.

This Deed, made this 25th day of April 1908 between A.D. Harrah and M.A. Harrah, his wife, of the City of Charleston, County of Kanawha and State of West Virginia, parties of the first part, and the Harrah Coal Land Company, a corporation organized and doing business under the laws of the State of West Virginia, party of the second part.

Witnesseth:

That for and in consideration of Five Dollars ($5.00) cash in hand paid, the receipt whereof is hereby acknowledged and certain other valuable considerations hereinafter maintained, (a) the said parties of the first part do grant, bargain, sell and convey unto the said party of the second part with covenants of general warranty, all the real estate, rights, interests and privileges, as hereinafter set forth and described in, to, of and concerning all these certain tracts, parcels and boundaries of land (hereinafter called tracts,) situate, lying and being in the waters of Levisa Fork and Russell's Forks, tributaries of the Big Sandy River, in the county of Buchanan and State of Virginia, that is to say: (b)

* * *

Together with the right of ingress, egress and passage over, through and under the surface of the said several tracts of land, for the purposes of mining and removing all the coal, oil and gas from said tract, as from the other lands mined by the said party of the second part, or assigns, and the right to

remove all the coal and other minerals, oil and gas, with out leaving any support for the overlying strata and with out any liability or damage which may result from the breaking of said strata, and the right to manufacture coke or other products from said coal, oil or gas and the right to use so much of the surface land as may be necessary for coal yards, dumping yards or grounds on which may be dumped the waste from the mines: for the erection and location of tipple building and machinery for mining purposes and for the erection of coke ovens, washeries, coal crushing and other machinery necessary for purposes, and for the erection of houses for miners, commissaries and such other buildings as may be necessary: also the right to use the water and necessary stone thereon for any and all purposes herein contemplated, and to pump the water from the said mines onto said surface if necessary, and for that purpose to lay, from time to time such pipes as may be necessary, also the right to cut and use such timber on said land as may be necessary for the purposes herein contemplated as specified in respect to the above described tracts respectively, and other necessary mining rights over and under the surface of said tracts of land. Rights-of-way, also, are here granted to the said party of the second part, or assigns, for each road, railroad and tram-roads through, over and under the surface of said tract of land, as may be necessary for removing the said coal or other minerals, from this and any other lands mined or leased by the said party of the

second part or assigns, and for other purposes incident to the operations herein contemplated; as fully and to the same extent in all respects as such rights, privileges and immunities are vested in the said party of the first part under and by virtue of the said several conveyances.

It is expressly provided that if the operations herein contemplated shall at any time be abandoned by the party of the second part, or assigns, then all machinery, houses, railroad, tram-roads, and materials of what ever character placed on the said land may be removed therefrom.

The said rights and privileges hereby granted shall forever run with and be appurtenant to any and all the coal and other minerals, oil, gas and timber, or other products in and under the said lands herein described, and in, on and under any other lands now owned or hereafter acquired, and also all coal and minerals, oil, gas and timber rights now owned or hereafter acquired by the said party of the second part, or assigns, and all persons as corporations claiming by, through or under it.

The said parties of the first part covenant that they have the rights to convey the said coal and other minerals, oil and gas, and the rights herein granted to the grantee, that they have done no act to encumber the same, that the said party of the second part shall have quiet possession of said coal and other minerals, oil and gas, and the rights herein granted free from all encumbrances; and that the

said parties of the first part will execute such further assurances of the said rights as may be required.

For the residue of the considerations of this conveyance, the said Harrah Coal Land Company, party of the second part, has executed to the said A.D. Harrah, party of the first part, its two notes for $41,299.70 each, bearing date the 25th day of April, 1908, due and payable at one and two years respectively, with interest from date, to secure the payment of which a vendor's lien is hereby expressly retained and reserved upon the property hereby conveyed. To have and to hold unto the said party of the second part and its assigns forever.

Witness the following signatures and seals.

A. D. Harrah (Seal)
M. A. Harrah (Seal)